86145-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRANDON S. CORISTINE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

STEVEN J. TUCKER
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TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

I.

STATEMENT OF THE CASE

The State defers to the statement of facts contained in *State v. Coristine*, 161 Wn. App. 945, 947, 252 P.3d 403 (2011).

II.

ARGUMENT

A. THE SOLE ISSUE RAISED IN THIS CASE IS WHETHER THE TRIAL COURT ERRED BY INCLUDING THE "REASONABLE BELIEF" JURY INSTRUCTION.

The defendant wishes to force his defense case into a particular mold and ignore the fact that a jury may interpret facts in a way that does comport with the confines of the crafted defense. The defendant, in his briefing, relies on the Division II case of *State v. McSorley*, 128 Wn. App. 598, 116 P.3d 431 (2005), which is, in turn, based on this Court's decision in *State v. Jones*, 99 Wn.2d 735, 748, 664 P.2d 1216 (1983). The *McSorley* case held that neither the trial court nor the State could force the defendant to use the affirmative defense of luring available in RCW 9A.40.090(2). This Court's opinion in *Jones* held that a defendant could not be forced to use a defense of insanity.

Neither of those two cases addresses the issue to be decided in this case. Both *McSorely* and *Jones* are not on all fours here because the

situation in this case involves a case where the defendant proceeded to present testimony that factually required the instruction in question. On the other hand, forcing the defendant in *Jones* to use an insanity defense required a restructuring of the defense. Likewise, to force the defendant in *McSorely* to use the affirmative defense when he apparently had not intended such, placed the defendant in the position of being at the end of a trial with potentially deficient evidence. That is not the case here. The trial court simply looked at the facts as elicited by both parties and determined that the facts needed the affirmative defense instruction in order for the jury to be properly instructed.

What the defendant is trying to accomplish with this appeal is to set a precedent whereby the defendant can place all manner of facts before the jury, but force a selective "pre-judging" by way of preventing all of the import of the facts from being known to the jury. The net effect is to give the defendant the ability to present facts and use them as both a sword and a shield. Instead of a fact being a fact, the defendant wants the jury to be prevented from understanding all aspects and importance of facts. The defendant wants to be able to escape potential negative consequences from any facts he might elicit.

The defendant can conduct his defense, but he cannot put blinders on the jury by way of forcing the trial court to ignore the facts and leave out jury instructions that bear on the facts already in evidence.

In this case the defendant was not prevented from pursuing the defense he had planned. No hand was placed on the defense tiller to steer the case in a direction the defendant did not want the case to go. What the defendant is upset about is that he did not think through the testimony he was presenting. When all was said and done, the evidence presented a possible affirmative defense of "reasonable belief." What should the trial court have done? The options open to the trial court were to ignore the testimony the defendant chose to present or give a complete set of instructions. If the defendant did not want to see the "reasonable belief instruction given, he could have chosen not to present testimony that logically demanded the "reasonable belief" instruction. The defendant cannot have it both ways.

As Division Three stated in its opinion in this case, it could very well have been an error *not* to give the "reasonable belief" instruction. *Coristine, supra* at 950. The defendant, in all his briefings has remained vague on exactly how he was prejudiced by the giving of the "reasonable belief" instruction. The "reasonable belief" instruction, RCW 9A.44.030(1) reads:

> (1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

RCW 9A.44.030(1).

A jury trying this case would have had to conclude that the defendant was guilty of the crime *before* it even considered the contested instruction. At worst, the contested instruction only gave another chance for the defendant to be found not guilty.

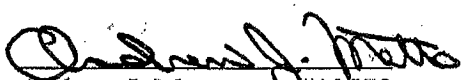
III.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 31st day of October, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON S. CORISTINE, Petitioner,	)	No. 86145-5 CERTIFICATE OF MAILING

CERTIFICATE

Kathleen L. Owens states: That I am a citizen of the United States of America and of the State of Washington, over the age of 21 years, not a party to the above-entitled action, and competent to be a witness therein; that on October 31, 2011, I e-mailed a true and correct copy of Supplemental Brief of Respondent, per the parties' agreement, addressed to:

Lisa Tabbut
lisa.tabbut@comcast.net

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

10/31/2011 (Date) Spokane, WA (Place) Kathleen L. Owens (Signature)